United States Court of Appeals

for the Second Circuit

REPLY BRIEF

NO. 76-4050

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMERICAN MAP COMPANY, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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This reply is only addressed to certain matters raised in the Company's brief that were not discussed in the Board's opening brief.

1. In challenging the Board's bargaining order, the Company erroneously implies that the order is premised solely on minor violations of Section 8(a)(1) of the Act. However, as demonstrated in the Board's opening brief, pp. 13-21, in issuing the bargaining order, the Board properly relied on the Company's numerous and pervasive violations of both Section 8(a)(1) and 8(a)(3). Further as we show below, the Company's argument is faulty in other respects.

a. Thus, initially, the Company argues (Br. 22-23) that the Union's majority was not undermined by the Company's unlawful conduct because, despite the Company's actions, the majority of unit employees thereafter signed union authorization cards. Of course, it is irrelevant whether the Company's threats of reprisals and other unlawful actions actually succeeded in making the unit employees discontinue their union activities, for proof of success is unnecessary where coercive conduct is shown. A threat is no less unlawful because the employees threatened are willing to risk reprisals in order to exercise their rights under the Act. *N.L.R.B. v. Wylie Manufacturing Co.*, 417 F.2d 192, 195 (C.A. 10, 1969), cert. denied, 397 U.S. 913; *Mon River Towing, Inc. v. N.L.R.B.*, 421 F.2d 1, 9 n. 24 (C.A. 3, 1969); *N.L.R.B. v. Brown-Dunkin Co., Inc.*, 287 F.2d 17, 18 (C.A. 10, 1961).[1]

b. The Company asserts (Br. 22-24) that there was no proof that a fair election could not have been held. Specifically, the Company argues that an election was possible because some of the strikers had been reinstated and the Union could have challenged the votes of the remaining strike replacements. This argument by the Company ignores the extensive unlawful campaign that it waged against the Union and the campaign's impact on the employees. The Board's general policy is to hold in abeyance any representation case where pending unfair labor practice charges filed by the petitioning union are based on conduct of a nature which would have a tendency to interfere with the free conduct of the election. See, *e.g.*, *Columbia Pictures Corp.*, 81 NLRB 1313, 1314 (1949).[2]

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[1] Contrary to the Company's assertion (Br. 23), the Board did not rely on the support of unit employees in the strike in determining majority status of the Union. In fact, the Board relied solely on the fact that the Union possessed valid authorization cards from a majority of the unit employees (A. 60).

[2] The Union filed its petition on May 2, 1974 for a representation election. The initial unfair labor practice charges in the instant case were filed on May 16, 1976.

Here, the Union, pursuant to Board procedures, filed a request to proceed with the election notwithstanding the pending charges, and the Regional Director therefore went ahead with the processing of the representation case. However, on July 2, 1974, the Board issued its decision in *Steel-Fab, Inc.*, 212 NLRB 363, holding that even in the absence of a violation of Section 8(a)(5) a bargaining order is a proper remedy for extensive and pervasive violations of the Act by an employer. The Regional Director, therefore, reasonably postponed the election scheduled for July 29, 1974, in order to evaluate the impact of the *Steel-Fab* decision on the Section 8(a)(1) and (3) charges pending in the instant case. On August 20, 1974, the complaint herein issued alleging, *inter alia*, the commission by the Company of conduct constituting violations of Section 8 (a)(1) and (3) and seeking the entry of a remedial bargaining order. The Union thereupon requested withdrawal of its election petition. Accordingly, on September 4, 1974 the Regional Director issued an order granting permission for withdrawal of the representation proceeding and, in addition, cancelling the election, noting that if the remedial bargaining order requested in the complaint were granted it would preclude the existence of a question concerning representation.[3]

c. The Company further contends (Br. 27-29) that the complaint herein lacks specificity, and that the findings of the Administrative Law Judge do not precisely conform to the complaint. It is well settled that "particularity of pleading is not required of a complaint issued by the Board." *Bob's Casing Crews, Inc. v. N.L.R.B.*, 458 F.2d 1301, 1304-1305 (C.A. 5, 1972), and cases cited. Moreover, the Company fails to show that it was prejudiced in any respect or hindered in its preparation for trial

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[3] The Regional Director's order of September 4, 1974, is reproduced *infra*, pp. 1-2. It was inadvertently omitted from the printed appendix.

by the alleged lack of specificity in the complaint. The only variance between the complaint and the Administrative Law Judge's findings was that the complaint alleged that "on or about" May 6 and thereafter Andrews, Scali, Brown and Weeks threatened the Company's employees with discharge if they rendered assistance to or support of the Union, while the ALJ found that some of the unlawful conversations took place at the beginning of May and on May 3. Where, as here, the Administrative Law Judge's findings relate to the subject matter of the complaint and the facts on which the findings are based were fully litigated, a minor variance between complaint and findings will not defeat the Board's determination. *REA Trucking Co. v. N.L.R.B.*, 439 F.2d 1065, 1066 (C.A. 9, 1971), and cases cited.

2. The Company (Br. 33-35) attacks various credibility determinations made by the Administrative Law Judge. These credibility resolutions, made after a careful evaluation of the conflicting testimony, the witnesses' demeanor and the inherent plausibility of the testimony are entitled to stand on review. For, as this Court has noted, in such a situation it is "not empowered to reject the Board's findings on credibility." *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 77 (C.A. 2, 1973). See also, *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

3. The Company argues (Br. 49-50) that the Court should examine the Administrative Law Judge's credibility findings because they demonstrate bias on his part. This contention is baseless. The Company rests its contention on that fact that the Administrative Law Judge credited all the General Counsel's witnesses, while discrediting the Company witnesses. It is well settled, however, that the mere fact that the Administrative Law Judge uniformly discredited the testimony of the Company witnesses is not

a basis for showing bias or prejudice. *N.L.R.B. v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659 (1949).

4. The Company contends (Br. 42) that even if Ambrose was discriminatorily discharged in violation of Section 8(a)(3) of the Act, the Company could refuse to reinstate him because he allegedly was a marginal worker. This claim is a last minute attempt by the Company to find an excuse for its unlawful action. Thus, Ambrose was employed by the Company for 10 years. During that time he was never reprimanded for his job performance; nor did the Company mention work performance to Ambrose when it refused to reinstate him. Clearly, as the Company tolerated Ambrose's work performance before he engaged in union activity, it cannot now rely on its alleged dissatisfaction with his work record to refuse him reinstatement. *Colour IV Corp.*, 202 NLRB 44 (1973), relied on by the Company, is factually distinguishable. In that case the employee, an economic striker, had been working for only 17 days at the time of the strike and had been hired with the understanding that he would become familiar with a particular job which he was unable to do. The Board found in these circumstances that the employer could refuse to reinstate him. In the instant case, as shown above, Ambrose, an unfair labor practice striker, had worked for the Company for 10 years before the strike, and had never been reprimanded for his job performance. Thus, there were no circumstances to justify the Company's refusal to reinstate him.

CONCLUSION

For the foregoing reasons, as well as those stated in the Board's opening brief, we respectfully submit that the Board's order should be enforced in full.

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National Labor Relations Board.

August 1976.

APPENDIX

GENERAL COUNSEL'S EXHIBIT NO. 11

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

AMERICAN MAP COMPANY, INC.
Employer

Case No. 2-RC-16513

and

LOCAL 923, RETAIL, WHOLESLAE &
DEPARTMENT STORE UNION, AFL-CIO
Petitioner

ORDER VACATING DIRECTION OF ELECTION
AND CANCELLING ELECTION
AND APPROVING WITHDRAWAL OF PETITION

On June 28, 1974, the Regional Director issued a Decision and Direction of Election in the above-entitled proceeding, upon a petition filed on May 8, 1974. Thereafter, an election was scheduled for July 29, 1974, which was postponed on July 26, 1974 to permit consideration of the unfair labor practice charge filed by Petitioner in Case No. 2-CA-13319. On August 20, 1974, a Complaint and Notice of Hearing in said unfair labor practice case issued against the Employer alleging, *inter alia*, the commission by the Employer of conduct constituting violations of Sections 8(a)(1) and (3) of the National Labor Relations Act and seeking the entry of a remedial order requiring the Employer to recognize and bargain with Petitioner. Such order, if granted, precludes the existence of a question concerning representation. Accordingly, I shall permit the withdrawal of the instant proceeding, subject to reinstatement by the Petitioner, if appropriate, upon final disposition of the aforesaid unfair labor practice case.

NOW THEREFORE IT IS ORDERED that the Direction of Election issued herein be, and it hereby is vacated; and the election heretofore directed and scheduled be, and it hereby is cancelled; and

IT FURTHER IS ORDERED that the Petitioner's request to withdraw its petition be, and it hereby is granted.

/s/ Sidney Danielson
Sidney Danielson, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

Dated: September 4, 1974
at New York, New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
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AMERICAN MAP COMPANY, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 17th day of August, 1976